A

Patricia Sue Lin Knudsen v Joey James Ghazlan

B COURT OF APPEAL (PUTRAJAYA) — APPEAL NO W-02(A)-1233–07 OF 2019
KAMARDIN HASHIM, AZIZAH NAWAWI AND MOHD SOFIAN JJCA
21 MAY 2021

C *Family Law — Children — Guardianship — Illegitimate child — Application by appellant for guardianship, custody, care and control of child dismissed by High Court — Appeal against — Whether appellant had good parenting skills — Whether appellant was morally fit to be a mother — Whether trial judge considered age and gender of child — Guardianship of Infants Act 1961 s 11 — Law Reform (Marriage and Divorce) Act 1976 s 88(3)*

D

This was an appeal against the decision of the High Court judge in dismissing the appellant's originating summons ('the OS'). The appellant's OS was for an order seeking guardianship, custody, care and control of the appellant's and respondent's daughter ('the child'). The second prayer was for the respondent to have reasonable access to the child. The appellant and the respondent both domiciled in Malaysia and were in an intimate relationship for approximately ten years. They were never legally married to each other. After their separation in early 2018, the appellant and respondent were sharing custody of the child without a fixed schedule. The appellant had filed the OS due to, inter alia, the following reasons: (a) the respondent had taken the child to the England, in May 2018 with the appellant's consent and with the agreement to return to Malaysia in July 2018; (b) the respondent threatened the appellant that he would return to Malaysia without bringing the child back; and (c) the respondent had reneged on his agreement to return the child to the appellant upon his return from England after spending around five weeks with her there. Without knowing where the respondent and the child were, as at the time the child was in the respondent's custody and the appellant could not locate their whereabout, the appellant filed the OS. The appellant's OS was dismissed by the learned judge on the ground that the appellant had no parenting skills and that she was morally unfit to be a mother. Hence this appeal.

E

F

G

H

Held, allowing the appeal with no order as to costs:

I

(1) The learned judge had failed to set out what were the required standards to qualify as good parenting skills and whether the appellant had failed to meet such standards. Parenting skills should not be the overarching consideration but the welfare of the child was the paramount consideration. The learned judge had failed to consider whether the

welfare of the child had been affected by the appellant's allegedly lacking in parenting skills. Added to that, the learned judge had failed to consider the fact that the appellant had the assistance of her family members to assist in raising the child whenever necessary. Further, the appellant was financially independent to raise the child. Therefore, there was no dispute that the appellant could meet the daily needs of the child, be it emotional, physical or financial. The appellant had the capacity to take care of the welfare of the child (see paras 40 & 42).

(2) The learned judge had misconstrued the appellant's statement as the same was made to explain her choice to have a live-in relationship with her partner. The learned judge had erred in deciding that because the respondent's averments were purportedly not rebutted, they must be deemed to be accepted. The respondent's averments were not specifically raised or relied upon in the respondent's affidavit in reply to the appellant's affidavit in support of the OS, hence did not require a specific reply and/or denial. The appellant's averment that she had never endangered the child's life or put her in harm's way and that she used Grab car to safely move around was not considered by the learned trial judge. The court had erroneously applied its own moral compass onto the appellant. Further, there was no evidence whatsoever that was produced by the respondent to indicate that the child's welfare and interest has been negatively affected due to the appellant's relationship with her partner. The learned trial judge had made several erroneous findings of fact with regards to the appellant's moral fitness which warranted appellate intervention. The respondent had failed to adduce convincing evidence that the appellant was an unfit mother to have guardianship, custody, care and control of the child. The appellant, as the natural mother of the child had taken care of her since birth, had provided her with her daily needs, as well as her emotional, physical and financial needs. There was no evidence that the child was deprived of a contented life under her care. As such, there was no evidence to establish that the appellant was morally unfit to be the mother of the child. She was legally qualified to have guardianship, custody, care and control of the child (see paras 44, 47–50 & 52–53).

(3) The learned judge had failed to take into consideration that one of the factors in considering the welfare of the child was the age of the child. Since the child was only two years old when the OS was filed, then the custody and care should had been granted to the appellant, the mother of the infant. It was in the best interest of the child, who was below seven years to be under the care and custody of the mother, the appellant herein, unless it could be proven that the child would be better off with the respondent. The learned High Court judge had failed to objectively assess and satisfactorily conclude whether the respondent had successfully rebutted the said presumption under s 88(3) of the Law

Reform (Marriage and Divorce) Act 1976 ('the LRA') despite the fact that the learned judge had applied the rebuttable presumption. The learned High Court judge did not make a specific finding that the said presumption was rebutted and this was a serious appealable error. The respondent had failed to establish that the appellant was an unfit mother. There was nothing to show that the appellant was an unsuitable person to cater for the daily needs of the child. The respondent had failed to rebut the presumption under s 88(3) of the LRA that it was in the best interest of the child aged seven years and below to be under the care and custody of the mother (see paras 54, 57 & 61–63).

(4) The child was a young girl of tender age, she should had the love, care and attention of her mother and that her upbringing should be the responsibility of her mother, the appellant. The learned trial judge had failed to sufficiently address her mind to the child's tender age and gender in reaching the decision to dismiss the appellant's OS (see paras 66–67).

[Bahasa Malaysia summary

Ini adalah rayuan terhadap keputusan hakim Mahkamah Tinggi dalam menolak saman pemula perayu ('OS'). OS perayu adalah untuk perintah memohon penjagaan anak, hak jagaan, pemeliharaan dan kawalan anak perempuan perayu dan responden ('anak'). Permohonan kedua adalah agar responden mendapat akses yang wajar kepada anak tersebut. Perayu dan responden kedua-duanya tinggal di Malaysia dan menjalin hubungan intim selama lebih kurang sepuluh tahun. Mereka tidak pernah berkahwin secara sah antara satu sama lain. Setelah berpisah pada awal tahun 2018, perayu dan responden berkongsi hak penjagaan anak tanpa jadual yang tetap. Perayu telah memfailkan OS kerana, antara lain, alasan berikut: (a) responden telah membawa anak tersebut ke England, pada Mei 2018 dengan persetujuan perayu dan dengan persetujuan untuk kembali ke Malaysia pada Julai 2018; (b) responden mengancam perayu bahawa dia akan kembali ke Malaysia tanpa membawa anak tersebut kembali; dan (c) responden telah mengingkari persetujuannya untuk mengembalikan anak tersebut kepada perayu setelah kembali dari England setelah menghabiskan sekitar lima minggu dengannya di sana. Tanpa mengetahui di mana responden dan anak tersebut berada, kerana pada masa itu anak tersebut berada dalam jagaan responden dan perayu tidak dapat mengetahui keberadaan mereka, perayu memfailkan OS. OS perayu ditolak oleh hakim yang bijaksana dengan alasan bahawa perayu tidak mempunyai kemahiran keibubapaan dan bahawa dia secara moral tidak layak untuk menjadi seorang ibu. Oleh itu rayuan ini.

Diputuskan, membenarkan rayuan tanpa perintah kos:

(1) Hakim yang bijaksana telah gagal untuk menentukan standard apa yang diperlukan untuk memenuhi syarat sebagai kemahiran keibubapaan yang baik dan sama ada perayu telah gagal memenuhi standard tersebut.

Kemahiran keibubapaan tidak seharusnya menjadi pertimbangan yang menyeluruh tetapi kesejahteraan anak adalah pertimbangan utama. Hakim yang bijaksana gagal mempertimbangkan sama ada kesejahteraan anak itu terjejas oleh perayu yang dikatakan kurang memiliki kemahiran keibubapaan. Selain itu, hakim yang bijaksana gagal mempertimbangkan fakta bahawa perayu mendapat bantuan daripada ahli keluarganya untuk membantu membesarkan anak itu bila perlu. Selanjutnya, perayu berdikari daripada segi kewangan untuk membesarkan anak itu. Oleh itu, tidak ada pertikaian bahawa perayu dapat memenuhi keperluan harian anak, baik emosi, fizikal atau kewangan. Perayu mempunyai kemampuan untuk menjaga kebajikan anak (lihat perenggan 40 & 42).

(2) Hakim yang bijaksana telah salah faham pernyataan perayu kerana hal yang sama dibuat untuk menjelaskan pilihannya untuk menjalin hubungan dengan pasangannya. Hakim yang bijaksana telah terkhilaf dalam memutuskan bahawa kerana kenyataan responden kononnya tidak dibantah, mereka harus dianggap diterima. Kenyataan responden tidak secara khusus dibangkitkan atau diandalkan dalam afidavit balasan responden untuk membalas afidavit sokongan perayu untuk menyokong OS, oleh itu tidak memerlukan balasan dan/atau penolakan khusus. Kenyataan perayu bahawa dia tidak pernah membahayakan nyawa anak itu atau membahayakannya dan bahawa dia menggunakan kereta Grab untuk bergerak dengan selamat tidak dipertimbangkan oleh hakim bicara yang bijaksana. Mahkamah telah terkhilaf menerapkan kompas moralnya sendiri kepada perayu. Selanjutnya, tidak ada bukti apa pun yang dihasilkan oleh responden untuk menunjukkan bahawa kebajikan dan kepentingan anak telah terpengaruh secara negatif kerana hubungan perayu dengan pasangannya. Hakim bicara yang bijaksana telah membuat beberapa penemuan fakta yang salah berkaitan dengan kesesuaian moral perayu yang memerlukan campur tangan rayuan. Responden telah gagal mengemukakan bukti yang meyakinkan bahawa perayu adalah ibu yang tidak layak untuk memiliki penjagaan anak, hak jagaan, pemeliharaan dan kawalan anak. Perayu, sebagai ibu kandung anak tersebut menjaganya sejak lahir, telah menyediakannya keperluan hariannya, serta keperluan emosional, fizikal dan kewangannya. Tidak ada bukti bahawa kanak-kanak itu kehilangan kehidupan yang berpuas hati di bawah jagaannya. Oleh itu, tidak ada bukti yang membuktikan bahawa perayu secara moral tidak layak untuk menjadi ibu kepada anak itu. Dia berkelayakan secara sah untuk memiliki penjagaan anak, hak jagaan, pemeliharaan dan kawalan anak (lihat perenggan 44, 47–50 & 52–53).

(3) Hakim yang bijaksana gagal mempertimbangkan bahawa salah satu faktor dalam mempertimbangkan kebajikan anak adalah usia anak. Oleh kerana anak tersebut baru berusia dua tahun ketika OS difailkan, maka

hak jagaan dan pemeliharaan seharusnya diberikan kepada perayu, ibu bayi tersebut. Demi kepentingan anak itu, yang berusia di bawah tujuh tahun untuk berada di bawah pemeliharaan dan hak jagaan ibu, perayu di sini, kecuali dapat dibuktikan bahawa anak tersebut akan lebih baik dengan responden. Hakim Mahkamah Tinggi yang bijaksana gagal menilai secara objektif dan menyimpulkan dengan memuaskan sama ada responden berjaya membantah anggapan di bawah s 88(3) Akta Membaharui Undang-Undang (Perkahwinan dan Perceraian) 1976 ('Akta') walaupun hakim yang bijaksana telah menggunakan anggapan yang boleh disangkal. Hakim Mahkamah Tinggi yang bijaksana tidak membuat penemuan khusus bahawa anggapan tersebut dibantah dan ini adalah kesalahan yang serius. Responden gagal membuktikan bahawa perayu adalah ibu yang tidak layak. Tidak ada yang menunjukkan bahawa perayu adalah orang yang tidak sesuai untuk memenuhi keperluan harian kanak-kanak itu. Responden gagal menolak anggapan di bawah s 88(3) Akta bahawa itu adalah kepentingan terbaik anak yang berusia tujuh tahun ke bawah berada di bawah pemeliharaan dan hak jagaan ibu (lihat perenggan 54, 57 & 61–63).

(4) Anak tersebut adalah seorang kanak-kanak perempuan berusia muda, dia seharusnya mendapat kasih sayang, jagaan dan perhatian daripada ibunya dan bahawa asuhannya harus menjadi tanggungjawab ibunya, perayu. Hakim bicara yang bijaksana gagal memberikan perhatian yang cukup pada usia dan jantina anak berusia muda dalam mengambil keputusan untuk menolak OS perayu (lihat perenggan 66–67).]

Cases referred to

Baby M (an infant) (adoption: consent), Re [1994] 2 MLJ 635; [1994] 1 LNS 195, HC (refd)

CIMB Bank Bhd (formerly known as Bumiputera Commerce Bank Bhd) v Sebang Gemilang Sdn Bhd & Anor [2018] 3 MLJ 689, FC (refd)

Foo Yet Chine (P) lwn Leong Meng Kuan (L) [2018] MLJU 209, HC (refd)

Gan Yook Chin (P) & Anor v Lee Ing Chin @ Lee Teck Seng & Ors [2005] 2 MLJ 1, FC (refd)

K Shanta Kumari v Vijayan [1986] 2 MLJ 216 (folld)

Lai Meng v Toh Chew Lian [2012] 8 MLJ 180, HC (refd)

Melissa Marie Albert v Malcolm Fernandez and another appeal [2019] 2 MLJ 290; [2019] 8 CLJ 181, CA (folld)

Myriam v Mohamed Ariff [1971] 1 MLJ 265 (folld)

Orr, Re [1933] 2 DLR 77, CA (folld)

Sean O' Casey Patterson v Chan Hoong Poh & Ors [2011] 4 MLJ 137, FC (folld)

Tan Siew Kee v Chua Ah Boey [1988] 3 MLJ 20, HC (refd)

Teoh Hock Soon v Chan Peng Soon [2012] 2 AMR 551; [2012] 2 CLJ 960; [2012] MLJU 71, HC (refd)

Thanaletchimy a/p Batamallai v Vijaya Kumar a/l Kassinathan [2018] 4 MLJ

557; [2018] 8 CLJ 61, CA (folld)

Legislation referred to

Family Law Reform Act 1987 [UK] s 1(1)
Guardianship of Infants Act 1961 ss 2(1), 3, 5, 11
Law Reform (Marriage and Divorce) Act 1976 s 88(3)

Aimal Korotana (Jasvinder Singh with him) (Korotana Law Office) for the appellant.
Harpal Singh Grewal (Fuzail Rahmat with him) (Fuzail, Kiob & Co) for the respondent.

Azizah Nawawi JCA:

INTRODUCTION

[1] This is an appeal against the decision of the High Court judge dated 26 June 2019 dismissing the appellant's originating summons ('OS'). The appellant's OS was for an order seeking guardianship, custody, care and control of the appellant's and respondent's daughter ('the child'). The second prayer is for the respondent to have reasonable access to the child.

[2] Having considered the appeal records and the submissions of the parties, this court has allowed the appeal with no order as to costs. Our decision was unanimous and these are our grounds for allowing the appeal.

THE SALIENT FACTS

[3] The appellant is a citizen of Denmark. The respondent and the child are both citizens of the United Kingdom. They are all currently domiciled in Malaysia. Both the appellant and respondent are in the entertainment industry in Malaysia.

[4] The appellant and the respondent are the biological parents of the child. They were in an intimate relationship for approximately ten years. They were never legally married to each other. Their child was born on 4 October 2016 in England, during the course of their relationship. The child is currently about five years old. Their intimate relationship ended on or around March 2018.

[5] After their separation in early 2018, the appellant and respondent were sharing custody of the child without a fixed schedule.

[6] The appellant had filed this OS due to, inter alia, the following reasons:

(a) that the respondent had initially taken the child to England sometime in May, 2018 with the appellant's consent with the agreement to return to Malaysia in early July, 2018;

(b) however, the appellant stated that the respondent had subsequently threatened the appellant on 4 July 2018 that he would return to Malaysia without bringing the child back with him;

(c) that due to the respondent's threat, the appellant had lodged a police report on 7 July 2018;

(d) that on 13 July 2018, the respondent had violently confronted the appellant while she was with the child at her residence parking basement. Fearing for her and her daughter's safety, the appellant had lodged a police report of the altercation on 14 July 2018; and

(e) that the respondent had reneged on his agreement to return the child to the appellant upon his return from England after spending around five weeks with her there.

[7] Without knowing where the respondent and the child were, the OS and an ex parte notice of application for an interim order was filed on 21 August 2018. At that material time, the child was in the respondent's custody and the appellant could not locate their whereabout.

[8] The appellant obtained an interim order for guardianship, custody, care and control of the child on 5 September 2018. The said interim order also directed the respondent to return the child to the appellant immediately.

[9] When the appellant failed to locate the respondent and the child, she lodges a police report on the child's disappearance 10 October 2018.

[10] Subsequently the appellant discovered that the respondent had taken the child to England sometime in September, 2018 without the appellant's consent when the child's passport was in the appellant's possession at all times (the second England trip).

[11] The appellant had to engage solicitors in England to take back custody of the child:

(a) a location order was issued by the High Court, Family Division, England on 10 October 2018 ordering the respondent to inform the Tipstaff of the whereabouts and location of the child; and

(b) a consent order was given by the High Court on 17 October 2018 where it was ordered, inter alia, that the respondent is to return the child to the appellant and that he is to bear the flight ticket expenses for their return to Malaysia.

[12] On 15 October 2018, the High Court granted an ex parte interim order for guardianship, custody, care and control over the child to the appellant.

[13] On an application filed by the respondent, the ex parte interim order dated 15 October 2018 was set aside by the High Court.

[14] On 26 June 2019, the appellant's OS was dismissed by the learned judge. Hence the appellant filed this appeal.

[15] The respondent has filed an Originating Summons WA-24F-226–07 of 2019 for full guardianship, custody, care and control of the child or in the alternative, that the appellant and respondent be granted joint guardianship, custody, care and control of the child. This application is pending in the High Court pending the outcome of this appeal.

THE DECISION OF THE HIGH COURT

[16] The learned High Court judge has dismissed the appellant's OS on the ground that the appellant has no parenting skills and that she is morally unfit to be a mother (see para [54] of the judgment).

OUR DECISION

[17] The central feature of appellate intervention is trite, that is to determine whether or not the trial court had arrived at its decision or finding correctly on the basis of the relevant law and/or the established evidence. This had been explained by the Federal Court in the case of *Gan Yook Chin (P) & Anor v Lee Ing Chin @ Lee Teck Seng & Ors* [2005] 2 MLJ 1, where the Federal Court held as follows:

> [14] In our view, the *Court of Appeal in citing these cases had clearly borne in mind the central feature of appellate intervention, ie to determine whether or not the trial court had arrived at its decision or finding correctly on the basis of the relevant law and/or the established evidence. In so doing, the Court of Appeal was perfectly entitled to examine the process of evaluation of the evidence by the trial court. Clearly, the phrase 'insufficient judicial appreciation of evidence' merely related to such a process. This is reflected in the Court of Appeal's restatement that a judge who was required to adjudicate upon a dispute must arrive at his decision on an issue of fact by assessing, weighing and, for good reasons, either accepting or rejecting the whole or any part of the evidence placed before him. The Court of Appeal further reiterated the principle central to appellate*

intervention, ie that a decision arrived at by a trial court without judicial appreciation of the evidence might be set aside on appeal. This is consistent with the established plainly wrong test. (Emphasis added.)

[18] In another case, the Federal Court in *CIMB Bank Bhd (formerly known as Bumiputera Commerce Bank Bhd) v Sebang Gemilang Sdn Bhd & Anor* [2018] 3 MLJ 689 held as follows:

[38] The issue of knowledge of the equitable assignment is entirely a question of facts. Both the courts below concluded that the appellant had knowledge of the equitable assignment based on the facts and circumstances of the case. *It is trite law that an appellate court will not, generally speaking, intervene unless the trial court is shown to be plainly wrong in arriving at its judicial decision or there has been no or insufficient judicial appreciation of evidence (see Gan Yook Chin (P) & Anor v Lee Ing Chin @ Lee Teck Seng & Ors* [2005] 2 MLJ 1). (Emphasis added.)

[19] Bearing in mind the above cases, we will now deal with the issues raised by the parties.

[20] The appellant submits that the legal position with regards to the rights over illegitimate children in Malaysia are governed by the cases of *Lai Meng v Toh Chew Lian* [2012] 8 MLJ 180 and *Foo Yet Chine (P) lwn Leong Meng Kuan (L)* [2018] MLJU 209. Both these cases applied the common law position that only the mother has the legal right over the illegitimate child, whilst the putative father has no legal rights over an illegitimate child.

[21] In the case of *Lai Meng* , the High Court held as follows:

[37] It is trite under English common law that the putative father has no legal rights over an illegitimate child. Only the natural mother has such legal rights over the illegitimate child.

[38] In *T v O* [1993] 1 MLJ 168 *Mahader Shankar J (as he then was) at p 172 stated*:

> Under English common law, a father of an illegitimate child had no 'rights' over the child merely by virtue of his paternity. He had a legal obligation to support it, provided that it could be legally established that he was the father.

[39] In *Yap Lee See v William Tay & Ors* [2010] MLJU 451; [2011] 1 CLJ 793 I summarised the current law in Malaysia, following English common law, on illegitimate children and concluded that the putative father has no rights over an illegitimate child. There, I also cited *Re Adoption Application No 41/61* [1962] 3 All ER 553 at p 562 where Diplock LJ stated:

> ... It was clear policy the court shall have no regard to interest of the putative father of an illegitimate child.

[40] In *Yap Lee See* it was an application by the natural mother for custody of the illegitimate child. I granted custody to the plaintiff mother, and since she had also

prayed for reasonable access to be granted to the putative father, I allowed that prayer but imposed the condition that access should be supervised in view of the high probability that the child might not be returned to the plaintiff after access by the putative father.

[41] In deciding the matter of guardianship and custody the court is guided by the following principles:

(a) whether the mother is considered morally unfit (see *Bromley's Family Law* (8th Ed), para 548 of *Halsbury's Laws of England*, Vol 24, The Law of Guardianships by Richard V Mackay — Oceana Publications Inc, New York, and also *Lim Suk Fang (f) v Lim Kim Heng* [1993] MLJU 298; [1993] 1 LNS 35, High Court, Kota Kinabalu, Syed Ahmad ldid J's decision in OS No K 24-22 of 1993 dated 19 November 1993);

(b) the welfare and best interests of the illegitimate child (see *Chelsa Cabalona Abdullah v Siek Ming Hua* [2008] 8 CLJ 285 at p 294, and *Tan Kong Meng v Zainon bt Md Zain & Anor* [1995] 4 CLJ 409); and

(c) the wishes of the natural mother:

In *T v O* at p 170, Mahadev Shankar J (as he then was) stated:

> The mother of an illegitimate child has prima facie the right of custody and when questions on custody arise, the wishes of the mother are to be taken into account but the welfare of the infant is the first and paramount consideration.

[79] I am of the opinion that it should only be in exceptional circumstances that a putative father be given the privilege of access to an illegitimate child. Each case has to be decided on its own merits.

[22] In *Foo Yet Chine* the following finding was made in respect of an illegitimate child:

[13] Berpandukan kepada prinsip-prinsip yang telah diputuskan tersebut, ternyatalah bahawa kasih sayang seorang ibu diiktiraf undang-undang sebagai suatu bentuk kebajikan atau kepentingan kepada kanak-kanak seusia LKE. Dengan kata lain, kebajikan anak di awal usia terjaga jika berada di dalam penjagaan seorang ibu. Oleh itu, sekiranya seseorang ibu itu memohon hak penjagaan ke atas anak kecilnya dengan menyatakan kesanggupan dan kesediaan berbuat demikian, maka mahkamah tidak boleh menolak permohonan ibu tersebut kecualilah dapat dibuktikan bahawa ibu tersebut tidak layak atau telah hilang kelayakan untuk menjaga anaknya.

[23] From the above cases, it is the submission of the appellant that following the common law position applied in *Lai Meng* and *Foo Yet Chine*, the appellant is prima facie entitled to full custody of the child and that the respondent has no legal right over her, unless the appellant can be established to be morally unfit. Consequentially, the appellant submits that the burden of

proof lies on the respondent to show that the appellant is morally unfit to be granted custody of the child, and that the respondent has failed to do so.

[24] However, the above common law position is no longer tenable in England, as the distinction between children born to a married couple and children born out of wedlock has largely been done away with by the operation of s 1(1) of the Family Law Reform Act 1987, which state as follows:

> In this Act and enactments passed and instruments made after the coming into force of this section, references (however expressed) to any relationship between two persons shall, unless the contrary appears, be construed without regard to whether or not the father and mother of either of them, or the father and mother of any person through whom the relationship is deduced, have or had been married to each other at any time.

[25] In Malaysia, we are of the considered opinion that we have already moved away from the abovementioned common law position expounded by the appellant.

[26] In *Sean O' Casey Patterson v Chan Hoong Poh & Ors* [2011] 4 MLJ 137, the Federal Court held that the Guardianship of Infants Act 1961 ('the GIA') applies to illegitimate children:

> [37] that we have in Malaysia our own GIA which contains s 1(3)(a). And this provision specifically expresses 'in the case of an illegitimate child'. We are of the view that there is no requirement for us to look further than this provision especially to s 5 of GIA, like what was done in Low *Pak Houng v Tan Kok Keong* to decide whether the GIA includes or excludes an illegitimate child. We conclude that the wordings of s 1(3)(a) of the GIA is sufficient to imply that this Act applies to an illegitimate child.

[27] The Federal Court's decision in *Sean O'Casey Patterson* was applied by the High Court in *Teoh Hock Soon v Chan Peng Soon* [2012] MLJU 71; [2012] 2 AMR 551; [2012] 2 CLJ 960 where the High Court held that s 3 of the GIA may be invoked for any application for guardianship and custody of an illegitimate child.

The law on guardianship, custody, care and control under the GIA

[28] Following the decision in *Sean O' Casey Patterson*, the GIA is applicable in this case. Under s 5 of the GIA, both the mother and the father have equal rights to custody and upbringing of the infant, defined in sub-s 2(1) as a person who has not attainted his majority. Section 5 reads:

> 5(1) In relation to the custody or upbringing of an infant or the administration of any property belonging to or held in trust for an infant or the application of the

income of any such property, a mother shall have the same rights and authority as the law allows to a father, and the rights and authority of mother and father shall be equal.

(2) The mother of an infant shall have the like powers of applying to the Court in respect of any matter affecting the infant as are possessed by the father.

[29] Section 3 of the GIA states that the guardian of an infant shall be responsible for his support, health and education. Section 3 of the GIA provides as follows:

The guardian of the person of an infant shall have the custody of the infant, and shall be responsible for his support, health and education.

[30] In determining the question of who is to have the custody of the child regard must be had to s 11 of the GIA and this section reads as follows:

11. The Court or a Judge, in exercising the powers conferred by this Act, shall have regard primarily to the welfare of the infant and shall, where the infant has a parent or parents, consider the wishes of such parent or both of them, as the case may be.

[31] From the above provisions of the GIA, we are of the considered opinion that the right of guardianship includes the right of custody and upbringing of an infant. As such, the issues of guardianship and custody should be considered together.

Matters to be considered

[32] The application of GIA in an application for custody can be seen from the case of *K Shanta Kumari v Vijayan* [1986] 2 MLJ 216, Justice Wan Yahya held as follows:

In deciding the question of custody under s 11 of the Guardianship of Infants Act 1961, it is imperative for this Court to note that no parent enjoys an earlier or superior right over the child and that the welfare of the infant should be the paramount consideration. *The care, comfort and attention as well as the well-being and happiness of the child are relevant matters to be considered. The Court may also look into the conduct of the parties and decide which of the two houses can offer the child better security and stability.* (Emphasis added.)

[33] In *Tan Siew Kee v Chua Ah Boey* [1988] 3 MLJ 20, Justice Chan Sek Keong held as follows:

So far as the law is concerned, *s 3 of the Guardianship of Infant Act (Cap 122, 1985 Ed) provides that in proceedings for the custody of an infant, the court shall regard the welfare of the infant as the first and paramount consideration and neither the father nor the mother has a superior right to custody*. This Act applies not only between spouses but to whoever are the parties before the court in any proceedings relating to the

custody of an infant: *J v C* [1970] AC 669 *(and in particular Lord Upjohn at p 724 et seq) and Re H (1965) 109 Sol J 575 (where the Court of Appeal upheld the decision of the court granting custody of an illegitimate child to the putative father on the ground that he could provide a stable home).*

The expression 'welfare' is to be taken in its widest sense. It means the general well-being of the child and all aspects of his upbringing, religious, moral as well as physical. His happiness, comfort and security also go to make up his well-being. A loving parent with a stable home is conducive to the attainment of such well-being. It is not to be measured in monetary terms.

[34] The case *Tan Siew Kee v Chua Ah Boey* was cited with approval by the Federal Court in *Sean O'Casey Patterson* where the Federal Court held as follows:

[56] And in respect of the welfare of the child, we would adopt what was stated by Chan Sek Keong JC (as he then was) in the Singapore case of *Tan Siew Kee v Chua Ah Boey* [1988] 3 MLJ 20; [1987] 1 LNS 77:

> The expression 'welfare' is to be taken in its widest sense. It means the general well-being of the child and all aspects of his upbringing, religious, moral as well as physical. His happiness, comfort and security also go to make up his well-being. A loving parent with a stable home is conducive to the attainment of such well-being. It is not to be measured in monetary terms.

[58] As we have suggested, the meaning of welfare must be considered in the widest sense and all factors necessary to be taken into account must be weighed against one another to arrive at a decision. It is impossible for us to lay down any specifics since circumstances in each case are so infinitely varied where even decided cases as precedent has limited application ...

[35] The Federal Court in *Sean O'Casey Patterson* also referred to the case of *Re Baby M (an infant) (adoption: consent)* [1994] 2 MLJ 635; [1994] 1 LNS 195, where Visu Sinnadurai J said:

> One major problem confronting the courts has been the question of the welfare of the child. As stated earlier, the adoption proceedings, unlike the position in custody cases, the law provides that the welfare of the child is only one of the factors to be considered by the court; *whereas in custody cases the welfare of the child is the main consideration*. (Emphasis added.)

[36] With regards to the 'welfare principle', the Federal Court in *Sean O'Casey Patterson* said this:

[53] According to *Halsbury's Laws of England* (4th End) reissue (Mackay Edition), para 443 the term, 'welfare principle' is a set of factors used when 'a court determines any question with respect to the upbringing of a child or the administration of a child's property or the application of any income arising from it, the child's welfare must be the court's paramount consideration'. In the English Children Act 1989,

under the heading *'welfare of the child' is a set of factors that must be taken into account when deciding on such cases. These are for example: the wishes of the child; his feelings; his age; his sex and his background and the capabilities of the parties involved. Thus, this term 'welfare principle' relates to certain factors to be considered and their priority during deliberation in such cases'.* (Emphasis added.)

[37] Therefore, from the above cited cases it is well settled law that the paramount consideration in an application for guardianship, custody, care and control of an infant under the GIA is the welfare of the infant. This principle was applied by the learned judge as can be seen from para [51] of the judgment where she held:

[51] In deciding whether to grant the plaintiff's application for custody, care and control of the child, this court's primary consideration is the welfare and the best interests of the child. It is settled law that the custody, care and control of an illegitimate child will be granted to the child's natural mother unless it is shown that the mother is morally unfit or unfit in other ways to be granted custody, care and control of the child. Also, notwithstanding that the child is illegitimate and is not a 'child of the marriage' under the LRA, the courts have applied the rebuttable presumption under s 88(3) of the LRA that it would be good for a child under seven years to be with her mother (see *Chan Eng Lim v Camille Yap & Other Cases*).

[38] However, despite the above statements, what the learned judge actually did was only to apply the test in *Teoh Hock Soon v Chan Peng Soon* [2012] 2 AMR 551; [2012] 2 CLJ 960; [2012] MLJU 71 and made the following findings:

[52] The test promulgated by Yeoh Wee Siam J (as she then was) in *Teoh Hock Soon v Chan Peng Soon*, states that in considering whether a mother is a fit mother or whether she is morally unfit or unfit in other ways to be granted custody, care and control of the child, a court must consider (i) the mother's parenting skills, and (ii) her morals as a mother.

[53] With regards to the plaintiff's parenting skills, there is no evidence produced before this court as to her parenting skills. The plaintiff also did not make any averments as to her parenting skills. It is not disputed that because of the plaintiff hectic social and work schedule as a radio and television personality, it is the plaintiff's mother who has been and continues to be the main caregiver of the child whilst the child is in the interim custody, care and control of the plaintiff.

[57] Let us look at the plaintiff's behaviour and conduct. She does not deny the defendant's averments in his affidavits that she had been driving a car without a valid driving licence and without insurance, even when the child is in the car. She also does not deny that she had on a number of occasions been driving under the influence of alcohol and that she had been involved in road accidents and crashed her car numerous times. Furthermore, she does not deny the incident on 13 July 2018 where she tried to run the defendant over with her car and crashed the car through the security barriers of the car park with the child in the car. It is trite law that where one party makes a positive assertion upon a material issue, the failure of

the other party to contradict it is treated as an admission by him of the fact so asserted (see *Ng Hee Thoong v Public Bank Bhd* [1995] 1 MLJ 281; [1995] 1 AMR 622; [1995] 1 CLJ 609 (CA)). Accordingly, the plaintiff's non-denial is by law taken as an admission by her of these facts asserted by the defendant.

[63] As the plaintiff herself averred in her affidavit 'I am free to live my life as I see fit'. Does this mean she will continue to drive with the child in the car without a valid driving licence, without insurance and under the influence of alcohol, continue to allow the child to sleep on the same bed as her latest partner and introduce such new partner as the new father figure in the child's life, and continue to alienate the child's biological father and his family from the child's life by prohibiting any physical access? There is nothing before this court to indicate that the plaintiff will change her conduct and lifestyle once she is granted custody, care and control of the child.

[64] After having considered all of the above, it is this court's view that it is not in the child's best interest and welfare for the custody, care and control of the child to be granted to the plaintiff. Furthermore, even if the plaintiff had made the application for guardianship under the correct provisions of the law, for the same reasons above, this court is similarly of the view that it is not in the child's best interest and welfare for the guardianship of the child to be granted to the plaintiff.

[39] Essentially, the learned trial judge had decided to dismiss the appellant's application for guardianship, custody, care and control of the child based on two issues, namely: (i) whether the appellant has good parenting skills; and (ii) whether she is morally fit to be a mother (see para [54] of the judgment).

Good parenting skills

[40] On the issue of good parenting skills, the learned judge has failed to set out what are the required standards to qualify as good parenting skills and whether the appellant had failed to meet such standards. The learned judge made a sweeping statement that merely because of the appellant's 'hectic social and work schedule as a radio and television personality' and that it is the appellant's mother who has been and continues to be the main caregiver of the child, she has therefore failed in her parenting skills. If that is the case, then many working mothers would also fail in the parenting skills.

[41] In any event, the appellant has averred that she has flexible working hours that would enable her to prioritise the child's wellbeing at all times. So the issue of a hectic social and work schedule is not the main criteria in ascertaining good parenting skills. A good parenting skill would be to meet the daily needs of a child, providing her with the right environment to grow up and to provide her with the emotional, physical and financial support. The appellant had averred that she is taking care of the child with the support of her Malaysian mother and her family.

[42] Added to that, we are of the considered opinion that parenting skills should not be the overarching consideration but the welfare of the child is the paramount consideration. On this we find that the learned judge has failed to consider whether the welfare of the child had been affected by the appellant's allegedly lacking in parenting skills. This is so bearing in mind that there is nothing to establish that the daily needs child were deprived by the appellant or her mother in taking care of the child. Added to that, the learned judge had failed to consider the fact that the appellant has the assistance of her family members to assist in raising the child whenever necessary. Further, the appellant is financially independent to raise the child. Therefore, there is no dispute that the appellant can meet the daily needs of the child, be it emotional, physical or financial. The appellant has the capacity to take care of the welfare of the child.

Moral standards

[43] The next issue that the learned judge decided was whether the appellant was morally fit to be a mother. On this issue, the learned judge had correctly cautioned herself that the court would not apply its own moral compass onto the appellant. Having considered the factual matrix of the case, the learned judge made a finding that the appellant was morally unfit to be a mother.

[44] The learned judge is clearly adverse to the appellant's statement in her affidavit that 'I am free to live my life as I see fit'. However, we agree with the appellant that the learned judge had misconstrued the said statement as the same was made to explain her choice to have a live-in relationship with her partner. The above statement in its full context read as follows:

> 10. In reply to paragraphs 21 and 22 of the said Affidavit in Reply, I am advised by my solicitors and verily believe that the Respondent cannot dictate whether I choose to have a relationship with another person and whether that person lives with me. I would like to emphasize that the Respondent and I are not going through divorce proceedings and I am free to live my life as I see fit.

[45] In any event, the respondent is in no position to harp on this as the child was conceived in similar circumstances anyway.

[46] The learned judge had also relied on the respondent's averments with regards to the appellant's purported behaviour of driving without a valid license and insurance with the child in the car, had been purportedly driving under the influence of alcohol and an incident which purportedly took place on 13 July 2018 to make a finding that the appellant is morally unfit to be a mother (see paras 57–58 of the judgment).

A **[47]** Having considered the affidavits filed by both parties, we find merit in the appellant's submission that the learned judge had erred in deciding that because the said respondent's averments were purportedly not rebutted, they must be deemed to be accepted.

B **[48]** We find that these averments made by the respondent were not specifically raised or relied upon in the respondent's affidavit in reply to the appellant's affidavit in support of the OS, hence did not require a specific reply and/or denial. These averments were only raised in the respondent's affidavit in support (earlier affidavit) to his notice of application in encl (16), which was C filed to set aside the interim ex parte order dated 15 October 2018. In his affidavit in reply to the OS, the respondent makes specific reference to a few paragraphs in his earlier affidavit but crucially, did not refer to the paragraphs where the allegations of the appellant's driving and of the incident on 13 July D 2018 were raised.

[49] In any event, we find that the appellant had averred that she has never endangered the child's life or put her in harm's way and that she uses Grab car to safely move around. We find that this averment was not considered by the E learned trial judge. We also find that the learned judge has failed to sufficiently consider the contents of the police report made by the appellant on 14 July 2018 against the respondent with regards to the incident which took place on 13 July 2018. Therefore, there is in fact a sufficient rebuttal of the facts averred by the respondent of the incident on 13 July 2018 by the appellant in the form F of the said police report, which is a contemporaneous document.

[50] The learned judge had also concluded that the appellant does not have the welfare and interest of the child as her topmost priority as there are purported concerns about the appellant co-habiting with a new partner (see G paras 59–61 of the judgment). On this, we agree with the appellant that the court had erroneously applied its own moral compass onto the appellant despite expressly stating that it should not do so and that what the court considers is morally appropriate behaviour is likely to be different from that of the appellant's. Further, there is no evidence whatsoever that was produced by H the respondent to indicate that the child's welfare and interest has been negatively affected due to the appellant's relationship with her partner. In any event, the various photos posted on Instagram relied by the respondent shows that the child was comfortable with the appellant's partner.

I **[51]** Added to that the learned judge had also misconstrued the respondent's averment that 'I aver that it is highly inappropriate for the child as a girl to be *spending time* with an unknown person especially at night ...' and made a finding that the respondent was concern that 'it was highly inappropriate for the *child to spend the night* with another man'. Such misconstruction led to the

learned judge finding in paragraph [63] of the judgment 'Does this mean she will ... continue to allow the child to sleep on the same bed as her latest partner', when there is no evidence of the same. We find that such misconstruction eventually led to the learned judge's finding that the appellant was morally unfit to be a mother. Further, the learned judge failed to consider the appellant's averment that the child has her own bedroom next to hers.

[52] Based on the reasons enumerated above, we find that the learned trial judge has made several erroneous findings of fact with regards to the appellant's moral fitness which warrant appellate intervention. We find that the respondent has failed to adduce convincing evidence that the appellant is an unfit mother to have guardianship, custody, care and control of the child.

[53] We find that the appellant, as the natural mother of the child had taken care of her since birth, has provided her with her daily needs, as well as her emotional, physical and financial needs. There is no evidence that the child is deprived of a contented life under her care. As such, we find no evidence to establish that the appellant is morally unfit to be the mother of the child. We find that she is legally qualified to have guardianship, custody, care and control of the child.

Age of the child

[54] We are also of the considered opinion that the learned judge has failed to take into consideration that one of the factors in considering the welfare of the child is the age of the child (see *Sean O'Casey Patterson*). It is not in dispute that when the OS was filed, the child was only two years old, and the child is currently five years old.

[55] In *Myriam v Mohamed Ariff* [1971] 1 MLJ 265, Abdul Hamid J (as he then was) when considering the custody of a three-years old infant said:

> To my mind, it would not be in the interests and welfare of this infant that he should be denied of the natural mother's love, care and affection. It is proper that he should be in the custody of the appellant until at least he reaches the age of 7 or 8 years at which time either party may be at liberty to apply.

[56] In *Re Orr* [1933] 2 DLR 77 (which was cited with approval in *K Shanta Kumari*, Muloch CJ commented:

> In the case of a father and mother living apart and each claiming the custody of a child, *the general rule is that the mother, other things being equal, is entitled to the custody and care of a child during what is called the period of nurture, namely, until it attains about seven years of age, the time during which it needs the care of the mother more than that of the father* ... (Emphasis added.)

[57] In *K Shanta Kumari*, Justice Wan Yahya held that under the GIA, even going on the assumption that both parents are equally capable of providing the care, comfort and attention to the infant, the courts have always leaned in favour of the mother being given custody of young infants. Therefore in this case, since the child was only two years old when the OS was filed, then the custody and care should have been granted to the appellant, the mother of the infant.

[58] Further to the general principle above, we find that the principle under sub-s 88(3) of the Law Reform (Marriage and Divorce) Act 1976 ('the LRA') is not only relevant, but applicable to an application for custody of the infant. This provision reads:

> 88 Power for court to make order for custody.
>
> (1) ...
>
> (2) ...
>
> (3) There shall be a rebuttable presumption that it is for the good of a child below the age of seven years to be with his or her mother but in deciding whether that presumption applies to the facts of any particular case, the court shall have regard to the undesirability of disturbing the life of a child by changes of custody.

[59] The statutory presumption under sub-s 88(3) of the LRA was considered by this court in *Melissa Marie Albert v Malcolm Fernandez and another appeal* [2019] 2 MLJ 290; [2019] 8 CLJ 181 where the court held that:

> [30] We were of the view that the care and custody of a child below the age of seven years old would naturally incline to the mother unless the presumption under s 88(3) of the LRA is rebutted. Strong grounds are needed to rebut this presumption. In short, prime facie the care and custody of a child of the tender age should remain with the mother and strong grounds are required to justify depriving the mother of such care and custody.

[60] In *Thanaletchimy a/p Batamallai v Vijaya Kumar a/l Kassinathan* [2018] 4 MLJ 557; [2018] 8 CLJ 61, this court held as follows:

> (2) Section 88(3) of the Law Reform (Marriage and Divorce) Act 1976 presumes, albeit rebuttable, that it is in the best interest of the child aged seven years and below to be under the care and custody of the mother unless it could be proven that the child would be better off with someone else. Strong grounds are needed to rebut this presumption. Other than mere unsubstantiated allegations by the defendant, there was no evidence to suggest that the plaintiff was an unfit mother to the child.
>
> ...
>
> [30] We were of the view that the care and custody of a child below the age of seven years old would naturally incline to the mother unless the presumption under s 88(3) of the LRA is rebutted. Strong grounds are needed to rebut this

presumption. In short prima facie the care and custody of a child of the tender age should remain with the mother and strong grounds are required to justify depriving the mother of such care and custody.

[31] In this present appeal, other than mere unsubstantiated allegations by the defendant against the plaintiff, there was no evidence to suggest that the plaintiff was an unfit mother

[61] Guided by the legal principles cited above, we are of the considered opinion that it is in the best interest of the child, who is below seven years to be under the care and custody of the mother, the appellant herein, unless it could be proven that the child would be better off with the respondent. However, strong grounds are required to rebut this presumption.

[62] On the factual matrix of this case, we find that the learned High Court judge had failed to objectively assess and satisfactorily conclude whether the respondent had successfully rebutted the said presumption under sub-s 88(3) of the LRA despite the fact that the learned judge had applied the rebuttable presumption. We agree with the appellant that the learned High Court judge did not make a specific finding that the said presumption was rebutted and we find that this is a serious appealable error.

[63] Further, since the learned judge has made several erroneous findings with regards to the parenting skills and morality of the appellant, we find that the respondent has failed to establish that the appellant was an unfit mother. There is nothing to show that the appellant is an unsuitable person to cater for the daily needs of the child. We therefore find that the respondent has failed to rebut the presumption under sub-s 88(3) of the LRA that it is in the best interest of the child aged seven years and below to be under the care and custody of the mother.

Gender of the child

[64] The Federal Court in *Sean O Casey Patterson* also considered that the gender of a child is a relevant consideration in the welfare of an infant.

[65] In *K Shanta Kumari v Vijayan* it was held that:

Even going on the assumption that both parents are equally capable of providing the care, comfort and attention to the infant, the Courts have always leaned in favour of the mother being given custody of young infants. The reason is very obvious. *An infant of tender age is by nature more physically and spiritually dependant on its own mother than anyone else*. In *Kades v Kades* (1961) 35 ALJR 251 the High Court in a joint judgment stated:

> What is left is the strong presumption which is not one of law but is founded on experience and upon the nature of ordinary human relationships, *that a young*

A

girl, should have the love, care and attention of the child's mother and that her upbringing should be the responsibility of her mother, if it is not possible to have the responsibility of both parents living together. (Emphasis added.)

B

[66] In the present appeal where the child is a young girl of tender age, she should have the love, care and attention of her mother and that her upbringing should be the responsibility of her mother, the appellant.

C

[67] In the premise, we are of the considered opinion that the learned trial judge has failed to sufficiently address her mind to the child's tender age and gender in reaching the decision to dismiss the appellant's OS.

CONCLUSION

D

[68] For the reasons stated above, we unanimously allowed the appeal with no order as to costs. We therefore set aside the order of the High Court dated 26 June 2019 and allowed the prayers in the OS.

Appeal allowed with no order as to costs.

E

Reported by Nabilah Syahida Abdullah Salleh

F

G

H

I